86-549

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET NO. 29,
CLARKSDALE, MISSISSIPPI,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The Food and Nutrition Service (FNS) of the United States Department of Agriculture disqualified Petitioner's grocery store from participating in the Food Stamp Program for a period of one year. Under the applicable regulation, the FNS may impose such a sanction only if certain requirements are met, including a determination that there existed a store "policy" to violate the Program rules and a finding that Petitioner received adequate "warning" prior to the alleged violative transactions, that violations may be occurring. The questions presented are as follows:

1) The FNS Instruction expressly requires that there be no "refusals" during the FNS investigation in order for a series of improper sales to constitute a "policy". May a store clerk's refusal to sell an ineligible item for food stamps be disregarded in order to impose the sanction?

2) Whether the letter from the FNS received by Petitioner's son and which followed a discussion between an FNS employee and Petitioner's son of alleged Program violations constituted adequate prior "warning" to Petitioner.

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UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The order of the district court (App. C) and its memorandum opinion (App. B) were entered on September 26, 1985. The memorandum opinion of the court of appeals (App. A) was issued on June 13, 1986. The opinions are not published in the official reports.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. C) was entered on June 13, 1986, and its order denying the Petition for Rehearing (App. C) was entered on August 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND FNS INSTRUCTIONS

7 U.S.C. § 2023.

7 C.F.R. § 278.6(e).

FNS INSTRUCTION 744-9 III A 2 a, B 1, D.

The pertinent text of the listed authorities is found at Appendix D.

STATEMENT OF THE CASE

Petitioner Angelo Thompson, d/b/a Liberty Supermarket No. 29, has been an authorized participant in the Federal Food Stamp Program since its inception in 1965. The Program is operated by the Food and Nutrition Service (FNS) of the United States Department of Agriculture.

In overseeing the Program, the FNS is empowered to impose various penalties on participants for violations of the Program's rules. The FNS may disqualify a store from participation in the Food Stamp Program for a period of one year if the store has a policy of selling clearly ineligible items in exchange for food stamps, provided that the store was previously warned about possible violations and their consequences. 7 C.F.R. § 278.6(e). To assist it in its determination of which, if any, administrative sanction to impose upon a store for Program violations, the FNS has prepared Instructions. Instruction 744-9 III B 1 describes what is needed to be found to satisfy the "policy" requirement of the one year disqualification penalty. Instruction 744-9 III D contains considerations applicable to the determination of whether an adequate "warning" was given to the participant.

Over the years, the FNS took various educational and compliance actions in connection with Petitioner's store, including visits to the store and discussions with store personnel. As a result of an investigation performed by the FNS in 1974, a warning letter (Trial Exhibit D-6) was sent by the FNS to the Petitioner on February 25, 1975. The letter charged in no uncertain terms that Food Stamp Program violations had occurred and that a disregard of the Program regulations was demonstrated. The warning letter further stated as follows:

> This is an official warning from the U.S. Department of Agriculture that if you are again found to be in violation of the regulations, you may lose your authorization to participate in the Food Stamp Program. You should take every precaution to insure that you and your employees understand and carefully follow the provisions of the program regulations.
>
> This determination shall not preclude the Department of Agriculture or any other agency or Department of the United States from taking further action to collect any claim determined under the regulations governing the Food Stamp Program or under any other pertinent statutes or regulations, nor shall this determination preclude prosecution under any applicable penal statutes.

This letter was the most recent official warning letter prior to the alleged violations giving rise to the present action. Without question, this letter fails to satisfy the "warning" requirement because it was in excess of three years old at the time of the subject transactions. FNS Instruction 744-9 III D.

The FNS had sent other letters to Petitioner confirming visits by FNS employees to discuss complaints of Program violations or other matters of concern. The last such letter prior to the subject transactions was sent by the FNS on December 7, 1979, following a discussion between an FNS employee and Mr. Thompson's twenty-three year old son.[1] The letter was received by Petition-

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[1] The letter (Trial Exhibit D-4) delivered to and signed for by Petitioner's son, reads as follows:

> Dear Mr. Thompson:
>
> This will confirm the conversation in your store on November 29, 1979, between your son, Marshall Thompson, and Food Program Specialist Lucille McDonald.
>
> During this visit Ms. McDonald discussed with Mr. Thompson a complaint received by this office alleging that your store was selling ineligible items for food stamps and discounting food stamps. These acts are violations of the Food Stamp Program

er's son, who was not the owner or manager of the store. At the time, Mr. Jack Morganti was the manager and Petitioner was not working at the store due to a serious illness.

In late 1980 and early 1981, the FNS conducted an undercover investigation of Petitioner's store. Several FNS agents attempted to purchase with food stamps eligible items and ineligible items. The details of each transaction are set forth in the agents' reports in the administrative record. During the transaction on October 16, 1980, the sales clerk refused to sell the agent a six-pack of beer for food stamps.[2] During the transaction

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Regulations, Section 278.2(a) which states coupons shall be accepted by an authorized retail food store only in exchange for eligible food. Your son denied that any violations were occurring in your store.

Ms. McDonald completely reviewed the regulations governing food stamp transactions with special emphasis on those which prohibit the sale of ineligible items or acceptance of coupons for cash loans (Section 278.2(a)), acceptance of coupons on credit accounts ((Section 278.2(f)), and redeeming coupons from unauthorized persons or sources (Section 278.2(g)).

A copy of the Food Stamp Program Regulations is enclosed for your review.

You should take special care to prevent violations because they may lead to your disqualification from the Food Stamp Program. You are responsible for violations committed by your employees. Therefore, it is vital that you make sure that all store employees, including new and part-time employees, know the program regulations and adhere to them.

If any of the above information is incorrect, you should contact this office. Please let us know if we can assist you in any way in meeting your responsibility as an authorized retailer in the Food Stamp Program.

Sincerely,

L. C. Ellis
Officer-in-Charge

[2] There was some question that the refusal may have been due to the agent being underage rather than the beer's ineligibility.

on December 17, 1980, the FNS agent asked a sales clerk to allow the purchase of a carton of cigarettes for food stamps. This request was refused. During the same transaction, the clerk allegedly allowed the agent to purchase several ineligible items including two packs of cigarettes, but only after the clerk checked to determine whether anyone was watching.

The FNS decided that the investigation showed violations of the Food Stamp Program regulations. The FNS disqualified Petitioner's store from participation in the Food Stamp Program for a period of one year. Further administrative review upheld the sanction.

Having exhausted the administrative remedies, Petitioner brought this action pursuant to 7 U.S.C. § 2023 seeking judicial review of the administrative action in the United States District Court for the Northern District of Mississippi, Delta Division. The matter came on to be heard for a non-jury trial on June 26, 1985. The District Court, Honorable Neal B. Biggers, Jr. presiding, affirmed the administrative sanction, its order being entered September 26, 1985. (App. C). Aggrieved, Petitioner sought the review of the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed the District Court's judgment and denied the Petition for Rehearing. (App. C).

Despite the finding that during the December 17, 1980, transaction the clerk had refused to sell a carton of cigarettes in exchange for food coupons, both the District Court and the Court of Appeals held that this refusal could be disregarded in determining whether the store had a "policy" of violating Food Stamp Program regulations. The transaction involving the refusal to

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There is no question that after the agent assured the clerk that the agent was of sufficient age, the clerk still refused to sell this major non-grocery-type ineligible item for food stamps.

allow the beer purchase was also disregarded. The "refusals" are significant because the Instruction concerning store "policy" relied upon below, FNS Instruction 744-9 III B 1 c, expressly requires that there be no refusals to sell ineligible items for food stamps during the FNS investigation.

Both the District Court and the Court of Appeals further held that the December 7, 1979, confirmation letter satisfied the "warning" requirement for the imposition of the one year sanction.

REASONS FOR GRANTING THE WRIT

The Petition seeking the Writ of Certiorari should be granted so that the Court may carefully scrutinize the proceedings below to assure that an injustice has not been done. The one year disqualification from participation in the Food Stamp Program is a harsh penalty. The Petitioner has worked for over 20 years to develop a substantial food stamp clientele, catering to the needs of the less affluent of the area's residents. In addition to substantial food sales in exchange for food coupons, food stamp customers also utilize cash or credit in making purchases of other items not eligible for purchase by food stamps while shopping. If unjustly penalized, the severity of the injury to Petitioner's business and livelihood, as well as to the employees and their families, is apparent.

A review of the proceedings below will demonstrate that the action of the FNS in imposing the one year disqualification penalty is not factually or legally justified. The action was erroneously upheld in the courts below and merits the attention of this Court.

The standard of review is to determine whether the sanction is arbitrary or capricious. This rule of law was succinctly stated by the Court of Appeals for the Fourth Circuit in *Cross v. United States*, 512 F.2d 1212, 1218 (4th Cir. 1975), as follows:

> To be "valid", a sanction must not be arbitrary and capricious, and a sanction is arbitrary and capricious if it is unwarranted in law or without justification in fact.

The courts below recognized this standard, citing *Goodman v. United States*, 518 F.2d 505 (5th Cir. 1975). However, at least two errors were made below in determining that the requirements for the one year disqualification penalty had been satisfied.

A. The "Policy" Requirement

The first error concerns a finding that there was a store "policy" of accepting food stamps for purchases of ineligible items. The one year penalty is proper only if:

> It is the firm's policy to sell expensive or conspicuous non-food items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons . . . .

7 C.F.R. § 278.6(e)(2)(i)(A).

The FNS and the courts below relied upon FNS Instruction 744-9 III B 1 c in upholding the finding that such a policy existed. (See Appendix D for full text.) This Instruction does not require management personnel to be involved in the allegedly violative sales.[3] The Instruction does require that the improper sales occur "without refusal during the course of the investigation."

There is no question that during the December 17, 1980, transaction the store clerk refused to sell the FNS agent a carton of cigarettes for food stamps. This fact was acknowledged by the FNS and both the District Court and the Court of Appeals found that this refusal had occurred. The lower courts opined that this refusal

---

[3] It is significant that management personnel were not involved in any of the alleged violations. Some courts have refused to penalize the store for employee misconduct due to the lack of involvement by ownership/management personnel. *See, e.g., Badwin v. United States*, 541 F.2d 1388 (10th Cir. 1976).

could be disregarded due to other violations by the same salesperson. We respectfully submit that this was error and that the existence of the refusal negates a finding of a "policy" under the FNS Instruction relied upon.[4]

The wording of the Instruction is clear. If a refusal occurs during the investigation, then a finding of a store policy under the Instruction is not proper. For a policy to be found, other criteria must be met, such as violations by the owner or management personnel. See FNS Instruction 744-9 III B 1 a, b.

The FNS drafted its Instructions to provide guidance and to give uniformity to determinations for the imposition of sanctions. To allow the undisputed "refusal" to be disregarded is to delete the words "without refusal during the course of the investigation" from the Instruction. This is not appropriate. There is no reason or authority to justify disregarding the refusal. It is logical that a store is not deemed to have a policy of violating Program rules when a clerk flat out refuses to sell a major non-grocery-type ineligible item for food stamps. That the clerk allegedly allowed the sale of a mere two packs of cigarettes, after checking to see if anyone was watching, does not erase the refusal to sell the carton of cigarettes. To allow exceptions to be carved out of the provisions is unjust and should not be permitted. This Court has yet to decide the question under consideration and no reported decisions of other courts have been found.

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[4] We submit that a single "refusal" during the investigation is sufficient to negate a finding of store "policy" under Instruction 744-9 III B 1 c. Nevertheless, the October 16, 1980, transaction involving the refusal to sell the beer should not be overlooked. The Regional Food Stamp Office considered this a "partial refusal", while the later determination, upheld below, disregarded the event. While there may be some question as to whether this incident nullifies a finding of "policy", fairness dictates that such doubts be resolved in favor of the alleged violator.

The Court's guidance is needed to assure that decisions as to sanctions are made in a just and uniform manner.

B. The "Warning" Requirement

In order to satisfy the "warning" requirement of 7 C.F.R. § 278.6(e)(2)(ii), FNS Instruction 744-9 III D requires a finding that within three years of the alleged violations, the store owner or manager was given a written warning that violations may be occurring and the consequences thereof. In the event of a change in management, the Instruction counsels the reviewer to determine whether the person in charge at the time of the alleged violations was aware of the earlier action. FNS Instruction 744-9 III D.

The opinion of the Court of Appeals (App. A) contains little discussion as to its determination that the December 1979 letter satisfied the warning requirement. The panel does state that Petitioner received the letter, but this finding is clearly erroneous.

The District Court opined that the question of whether the confirmation letter satisfied the warning requirement had been previously addressed and answered contrary to Petitioner's position in *Otto v. Block*, 693 F.2d 472 (5th Cir. 1982). However, close scrutiny of *Otto v. Block* demonstrates that it is not on point. There the court was required to determine whether "compliance action" had occurred. FNS Instruction 744-9 III D defines "compliance action" as "any action taken to confront the retailer with the possibility that violations are being committed in the store and cautioning him/her against further violations." The Court in *Otto v. Block* was attempting to decide whether a "policy" existed from the record and the alleged "previous compliance action" under FNS Instruction 744-9 III B. The "warning" requirement of 7 C.F.R. § 278.6(e)(ii) was not in issue. The existence of a firm "policy" of selling ineligible items for food

stamps is an entirely different consideration from the existence of an adequate "warning" of previous violations. 7 C.F.R. 278.6(e). That compliance action occurred does not require a finding that an adequate warning, as defined in the Instructions, was given to the store owner.

The Court of Appeals did not cite *Otto v. Block* or any other decision in finding the 1979 confirmation letter to have satisfied the warning requirement. The ruling below is in conflict with the decision of the Fourth Circuit Court of Appeals in *Tant v. United States*, 656 F.2d 691 (4th Cir. 1981), wherein the grocer contended that the sanction was unjustified because no warning letter had been sent. It was undisputed that FNS agents had made numerous educational and compliance visits and that *confirmation letters* were sent by the FNS to the store owner on three occasions. The panel found that a prior warning was not required to impose the sixty day suspension in issue. It is clear that the panel did not consider the letters confirming compliance visits to constitute a sufficient warning of program violations. A review by this Court could resolve the conflict between the *Tant* decision and the decision of the panel below.

The letters under consideration in *Bruno's Inc. v. United States*, 624 F.2d 592 (5th Cir. 1980), clearly stated that the FNS thought the subject grocer was violating the Food Stamp Act. Such letters, like the official warning letter of 1975 herein, give the grocer fair warning of alleged violations and their consequences. To the contrary, the 1979 letter does not have the force of a clear warning and merely confirmed a brief visit by an FNS employee and Petitioner's son.

Moreover, the alleged warning was not given to the owner or the manager, contrary to the dictates of FNS Instruction 744-9 III D 1, and the fact that there was a change in management between the time of the 1979

compliance action and the time of the subject transactions was overlooked below. The determination that the Petitioner received sufficient warning is factually unwarranted. FNS Instruction 744-9 III D. The FNS action is therefore deemed to be arbitrary and capricious under *Goodman v. United States*, *supra*, and the Court's reversal of the unjustified action is required.

CONCLUSION

The FNS failed to follow its own guidelines in imposing the one year disqualification sanction upon the Petitioner. The finding of a store "policy" of allowing the use of food stamps for the purchase of ineligible items is improper in the face of a "refusal" during the FNS investigation. Furthermore, the facts and the law fail to show that Petitioner received satisfactory "warning" of previous possible violations as defined by the FNS Instructions.

This Court has not previously considered the questions presented herein. The Court's guidance is needed to settle these important issues to assure that the penalty provisions of the food stamp regulations are fairly and uniformly applied to the Petitioner, as well as to the thousands of other participating stores.

Accordingly, we respectfully request that the Court grant the Petition for Writ of Certiorari so as to review the sanction imposed upon the Petitioner.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4727

Summary Calendar

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET # 29
CLARKSDALE, MISSISSIPPI,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

(June 13, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burden on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Appellant, Angelo Thompson, appeals the district court's order affirming a decision of the Food and Nutrition Service (FNS) of the United States Department of Agriculture that appellant's grocery store be disqualified from participating in the food stamp program for a period of one year. We find no error and affirm.

In response to complaints that appellant was violating food stamp program rules, FNS investigated appellant's food stamp transactions between August 1980 and January 1981. During each of the eight shopping visits FNS investigators made to the store, a significant number of ineligible non-food items such as paper products, household cleaning products and cigarettes were sold by appellant for food stamps. Because the continued sale of ineligible items violated program rules, FNS disqualified appellant from the program for one year. Appellant sought review of this decision and exhuasted administrative remedies. The district court affirmed the one year sanction.

FNS may impose a one year disqualification for program violations if: (1) "it is the firm's policy to sell expensive or conspicuous non-food items, cartons of cigarettes or alcoholic beverages" for food stamps; and (2) "the firm was warned about the possibility that violations were occurring and the possible consequences of violating the regulations." 7 C.F.R. § 278.6(e)(2). Under published FNS implementing instructions, the above regulation is satisfied when there have been: (1) four clearly violative sales of ineligible items; (2) without refusal; (3) including three incidents where a major ineligible item such as a carton of cigarettes is sold; (4) involving two or more clerks; (5) less than three years after a written warning has been given. FNS Instructions 744-9 III A 2 a (3) (b) and 744-9 III B 1 c.

Both parties agree that our review of this administrative decision is restricted to determining whether the sanction is "arbitary or capricious," that is, unwarranted

in law and without justification in fact. *Goodman v. United States*, 518 F.2d 505 (5th Cir. 1975).

Appellant contends that during two of the visits by investigators, he refused to sell ineligible items and that those sales cannot be used to justify a one year disqualification. On one occasion an investigator attempted to purchase a six pack of beer with food stamps. The clerk refused to sell the beer. The investigator's report indicates, however, that this sale was refused because the purchaser appeared to be underage, not because the purchase was attempted with food stamps. The finding that this did not constitute a refusal under FNS instructions is adequately supported by the record.

On another occasion when an investigator attempted to purchase a carton of cigarettes, the clerk refused to sell the carton but agreed to sell several loose packs. Because the clerk sold the loose packs as well as several other ineligible items during the transaction, the failure to sell the carton of cigarettes constitutes only a "partial refusal." The applicable FNS instruction provides:

> Only occasionally should a violative transaction in which there has been a partial refusal be disregarded, and then only when there is good reason for doing so. For example, partial refusals to sell only major non-grocery ineligible items or to discount food stamps would not diminish the seriousness of four sales of common grocery-type ineligible items without refusals to sell those types of items.

In light of the number of ineligible items sold, FNS's refusal to disregard this transaction in determining the sanction to impose was justified.

Appellant also argues that he was not properly warned before disqualification. FNS instructions and regulations require a warning within three years of the investigation informing the owner of possible violations and the potential consequences of non-compliance with program

regulations. The record indicates appellant was given such a warning in a compliance action confirmation letter he received December 7, 1979, less than one year before the investigation.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC82-117-NB

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET # 29,
Plaintiff,

v.

AGRI-FOOD NUTRITION SERVICE, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiff Angelo Thompson, d/b/a Liberty Supermarket No. 29, Coahoma County, Mississippi, brings this action under 7 U.S.C. § 2023 seeking *de novo* review of the decision by the Food and Nutrition Service (FNS) to disqualify the plaintiff's store from participation in the Food Stamp Program for a period of one year. During the non-jury trial held before this court, plaintiff did not choose to contest the administrative finding that the plaintiff violated the food stamp regulations. Rather, plaintiff challenges the imposition of the one-year sanction. Although the court may review *de novo* the factual findings of the administrative agency, since the determination of the specific period of disqualification is a matter lying within the discretionary authority of the FNS, this court's scope of review is limited to whether the decision was arbitrary and capricious. *See Goodman v. United States*, 518 F.2d 505, 509 (5th Cir. 1975).

7 C.F.R. 278-6 [1] deals with disqualifications of retail food stores, and the pertinent parts of this section are as follows:

> Section 278.6 Disqualification of retail food stores and wholesale food food concerns, and imposition of civil money penalties in lieu of disqualifications.
>
> (a) Authority to disqualify or subject to a civil money penalty. FNS may disqualify any authorized retail food store or authorized wholesale food concern from further participation in the program for a reasonable period of time, not to exceed 3 years, as FNS may determine, if the firm fails to comply with the Food Stamp Act . . . .
>
> (b) Charge letter. Any firm considered for disqualification or imposition of a civil money penalty under paragraph (a) of this section shall have full opportunity to submit to FNS information, explanation, or evidence concerning any instances of noncompliance before FNS makes a final administrative determination. The FNS regional office shall send the firm a letter of charges before determination. The letter shall specify the violations or actions which FNS believes constitute a basis for disqualification or imposition of a civil money penalty. The letter shall inform the firm that it may respond either orally or in writing to the charges contained in the letter within 10 days of receiving the letter. The firm's response shall set forth a statement of evidence, information, or explanation concerning the specified violations or acts. The firm shall makes its response, if any, to the officer in charge of the

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[1] All citations to 7 C.F.R. are references to the regulations that were in effect in 1981 that are controlling in this case. Since that time, both the Food Stamp Act and the regulations thereunder have been amended. Among other changes, the length and severity of periods of disqualification have been substantially increased.

FNS field office which has responsibility for the project area in which the firm is located.

(c) Review of evidence. The letter of charges, the response, and any other information available to FNS shall be reviewed and considered by the appropriate FNS regional office, which shall then issue the determination.

(d) Basis for determination. The FNS regional office making a disqualification or penalty determination shall consider: (1) the nature and scope of the violations committed by personnel of the firm, (2) any prior action taken by FNS to warn the firm bout the possibility that violations are occurring, and (3) any other evidence that shows the firm's intent to violate the regulations.

(e) Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations. The FNS regional office shall:

> . . . (2) Disqualify the firm for one year if: (i) The evidence shows that: (A) It is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons, and the firm has engaged in such practices, or (B) The firm bought coupons at discount, and (ii) The firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations. The regional office may disqualify a firm for 1 year, even though the firm was not warned about the possibility that violations were occurring, if the regional office finds that the firm has committed unusually serious violations of the kind described in (i) (A) or (B) of this subparagraph.

In the instant case, the store was originally authorized to participate in the food stamp program, under plain-

tiff's ownership, in 1965 as Liberty Cash Grocery No. 29. Thereafter, from 1965 through 1981, food stamp program representatives made a total of thirty-one visits to plaintiff's store. These visits were made for the purpose of assuring a complete understanding of the food stamp program rules and the need for strict compliance therewith. Following six of these visits involving discussions of program compliance matters, letters were sent to Angelo Thompson by certified mail which confirmed the discussions.

An investigation to determine the level of compliance was subsequently made at plaintiff's store. During this compliance investigation, a total of one hundred and ninety items were listed as sold during the transactions, of which sixty-five or about thirty-four percent were ineligible items including four cartons and two packs of cigarettes, bleach, insect spray, furniture polish, glue, household ammonia, foot powder, aluminum foil, deodorant, toothpaste, tampons, stain remover, spray starch, birthday candles, cotton swabs and a variety of other soap, paper, plastic and household cleaning items.

On April 3, 1981, the violations were sent forth in the form of a charge letter sent to plaintiff.

An administrative review and evaluation was made and a determination was made that plaintiff had violated the Food Stamp Act and regulations, and plaintiff's store was disqualified from participation in the food stamp program for a period of one year.

Plaintiff requested an administrative review of the decision of the Food and Nutrition Service and the one-year disqualification was sustained.

Thereafter, plaintiff filed the instant action requesting judicial review of the administrative decision. Plaintiff notes that under 7 C.F.R. § 278.6(e), the FNS may not impose a one-year disqualification unless it determines that (1) it was plaintiff's policy to sell ineligible items

and (2) the plaintiff was adequately warned prior to the alleged violations. It is plaintiff's contention that the administrative record does not contain sufficient facts to support a finding that either of the above requirements has been satisfied. Thus, according to the plaintiff, the decision to impose the one-year disqualification was arbitrary and capricious.

I. Adequate Warning

In regard to the issue of adequate warning, the evidence showed that from 1965 through 1981, a total of thirty-one visits were made by food stamp program officials to plaintiff's store. The majority of these visits were educational in nature. However, compliance visits were made on six occasions. Compliance visits are based upon reports to food stamp officials of violations or excessively high and/or erratic food stamp redemptions. After each of said compliance visits, confirming letters were mailed to plaintiff.

The last confirming letter, dated December 7, 1979, sent to plaintiff less than one year prior to the beginning of the investigation which led to the one-year disqualification stated in part:

> During this visit Ms. McDonald discussed with Mr. Thompson a complaint received by this office alleging that your store was selling ineligible items for food stamps and discounting food stamps. These acts are violations of the Food Stamp Program Regulations, Section 278.2(a) of which states coupons shall be accepted only in exchange for eligible food. Your son denied that any violations were occurring in your store.

The letter further stated that:

> Ms. McDonald completely reviewed the Regulations governing food stamp transactions with special emphasis on those which prohibit the sale of ineligible

> items or acceptance of coupons for cash loans . . . and redeeming coupons from unauthorized persons or sources . . . .

Plaintiff was warned in the letter that:

> You should take special care to prevent violations because they may lead to your disqualification from the Food Stamp Program. You are responsible for violations committed by your employees. Therefore, it is vital that you make sure that all store employees, including new and part-time employees know the regulations and adhere to them.

A copy of the Program Regulations was enclosed with the letter.

This letter, dated December 7, 1979, confirming the compliance visit of November 29, 1979, less than one year prior to the investigation, constitutes adequate warning "about the possibility that violations were occurring and of the possible consequences of violating the Regulations" as required for a one-year disqualification by Food Stamp Regulations, 7 C.F.R. § 278.6(e)(2)(ii). Plaintiff would have the court to believe that the compliance visit and confirming letter failed to adequately warn plaintiff of "the possibility that violations were occurring."

This precise question has been addressed by the United States Court of Appeals for the Fifth Circuit in *Otto v. Block*, 693 F.2d 472 (5th Cir. 1982). There, the Food and Nutrition Service, following the same procedure as in the instant case, visited plaintiff's store, discussed with plaintiff the store's high coupon redemption rate, reviewed food stamp regulations and followed up the visit by letter to plaintiff, the court found that "[c]learly, adequate formal warnings, or 'compliance action,' took place in this case." This ruling is in accordance with FNS Instruction 744-9 III(c)(2) which defines compliance action as "any action taken to confront the retailer with the possibility that violations are being com-

mitted in his store and cautioning him against further violations." Therefore, it is clear in this case that plaintiff was adequately warned of the possibility that violations were occurring and the consequences of such violations.

II. Firm Policy

Plaintiff also argues that the FNS erred in finding that it was the policy of plaintiff's firm to sell ineligible items, by considering evidence of specific acts of the sale of ineligible items. The testimony of two FNS officials, Mr. Louis Mathis and Mr. Ralph Dean, established that the finding of a firm policy was based on the following FNS guideline:

> 1 *Operating Policy of the Store.* As a general rule, violations shall be attributed to a disregard of program regulations as opposed to carelessness or poor supervision, when there have been a minimum of four clearly violative sales of ineligible items, and any or all of the following persons took an active part in the violations:
>
> > c *Two or more clerks* who sell common grocery-type or major non-grocery-type ineligible items without refusal during the course of the investigation when there is a record of previous compliance action which documents that the owner or appropriate store official had been cautioned about the possibility of violations occurring in the store and the consequence of being found violating.

FNS Instruction 744-9 III (B) (1).

Plaintiff contends that there were two "refusals" to sell ineligible items during the investigation thus preventing an administrative finding, under the test provided by the above FNS Instruction, that a policy existed. The investigative report, a part of the administrative record introduced into evidence at trial, shows that plain-

tiff's employees violated food stamp regulations during each of the eight transactions which constituted the investigation. On one occasion, Carrie Belbedresi, a clerk at the store, declined to sell a six-pack of beer to the investigative aide, stating that the aide did not appear old enough to purchase beer. The clerk did not refuse to sell the beer to the aide because the aide was using food stamps. In fact, during the same transaction, Carrie Belbedresi sold all nine of the other ineligible items without hesitation. In addition, the same clerk, Carrie Belbedresi, later sold without hesitation a total of seven ineligible items to a different investigative aide who used food stamps to make the purchase.

Plaintiff also claims that there was a refusal by J. T. Miller to sell cigarettes. The investigative report shows that on one occasion J. T. Miller declined to sell a carton of cigarettes but did sell two packs of cigarettes for food stamps. In assessing whether a partial refusal may be deemed a refusal for purposes of determining the existence of a firm policy, FNS Instruction 744-9 III B(2) provides guidance:

> *Refusals to Violate.* Complete or partial refusals to violate the program must be carefully examined to determine whether reported violations were possibly a result of error or misunderstanding. Attention shall be given to the store personnel and the types of attempted violations involved in the refusals, the extent of the refusals, and the pattern of the refusals. For example, a case in which the clerk sold ineligible items and the owner refused to do so would be considered less serious than a case in which the opposite occurred.
>
> In evaluating partial refusals, the reviewer shall carefully examine the type and number of items sold and refused, and the number of times partial and complete refusals occurred. Also, the remarks of the clerks may be significant in this evaluation. Only

> occasionally should a violative transaction in which there has been a partial refusal be disregarded, and then only when there is good reason for doing so. For example, partial refusals to sell only major non-grocery type ineligible items or to discount food stamps would not diminish the seriousness of four sales of common grocery-type ineligible items without refusals to sell those types of items.

The above instruction directs the investigator and the reviewing officer to look beyond the form of the transaction to the apparent basis for the refusal and to the surrounding circumstances in order to determine whether the refusal may be characterized as such for purposes of determining compliance with the Food Stamp Act. The administrative record reveals that both Carrie Belbedresi and J. T. Miller were involved in the sale of numerous ineligible items during the investigation of plaintiff's store. In fact, J. T. Miller, although refusing to sell a carton of cigarettes on one occasion, did not hesitate to sell two cartons of cigarettes on another occasion. It is clear, therefore, that the alleged refusals cannot be characterized as such for present purposes. Therefore, ample facts exist to support the finding of a firm policy to sell ineligible items.

From the foregoing, it is the opinion of this court that the decision of the FNS to impose a one-year disqualification was justified by the facts and warranted by existing law, and is therefore not found to be arbitrary and capricious. The agency's decision is therefore affirmed. An order will issue accordingly.

THIS, the 26th day of September, 1985.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4727

Summary Calendar

D.C. Docket No. DC82-117-NB-O

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET # 29
CLARKSDALE, MISSISSIPPI,
Plaintiff-Appellant,

versus

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi

Before GEE, RANDALL and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

June 13, 1986

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-4727

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET # 29
CLARKSDALE, MISSISSIPPI,
Plaintiff-Appellant,

versus

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Mississippi

ON PETITION FOR REHEARING
(August 15, 1986)

Before GEE, RANDALL and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ W. E. Davis
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

No. DC82-117-NB

ANGELO THOMPSON, d/b/a
LIBERTY SUPERMARKET # 29,
Plaintiff,

v.

AGRI-FOOD NUTRITION SERVICE, *et al.*,
Defendants.

ORDER

In accordance with a memorandum opinion this day issued, it is hereby ORDERED:

That the administrative decision in the above-styled cause shall be and hereby is AFFIRMED; and

That this cause is hereby DISMISSED with prejudice.

THIS, the 26th day of September, 1985.

/s/ Neal Biggers
NEAL B. BIGGERS, JR.
United States District Judge

APPENDIX D

7 U.S.C. § 2023. Administrative and judicial review; restoration of rights

(a) Whenever an application of a retail food store or wholesale food concern to participate in the food stamp program is denied pursuant to section 2018 of this title, or a retail food store or wholesale food concern is disqualified or subjected to a civil money penalty under the provisions of section 2021 of this title, or a retail food store or wholesale food concern forfeits a bond under section 2021(d) of this title, or all or part of any claim of a retail food store or wholesale food concern is denied under the provisions of section 2022 of this title, or a claim against a State agency is stated pursuant to the provisions of section 2022 of this title, notice of such administrative action shall be issued to the retail food store, wholesale food concern, or State agency involved. Such notice shall be delivered by certified mail or personal service. If such store, concern, or State agency is aggrieved by such action, it may, in accordance with regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunty to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store, concern, or State agency fails to submit information in support of its position after filing a request, the administrative determination shall be final. If such request is made by such store, concern, or State agency, such information as may be submitted by the store, concern, or State agency, as well as such other information as may be available, shall be reviewed by the person or persons designated by the Secretary, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect thirty days after the date of the delivery or service of such final notice of determination. If the store, concern, or State agency feels aggrieved by such final determination, it may obtain judicial review

thereof by filing a complaint against the United States in the United States court for the district in which it resides or is engaged in business, or, in the case of a retail food store or wholesale food concern, in any court of record of the State having competent jurisdiction, within thirty days after date of delivery or service of the final notice of determination upon it, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as the Secretary may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid, it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless on application to the court on not less than ten days' notice, and after hearing thereon and a consideration by the court of the applicant's likelihood of prevailing on the merits and of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal.

(b) In any judicial action arising under this chapter, any food stamp allotments found to have been wrongfully withheld shall be restored only for periods of not more than one year prior to the date of the commencement of such action, or in the case of an action seeking review of a final State agency determination, not more than one year prior to the date of the filing of a request with the State for the restoration of such allotments or, in either case, not more than one year prior to the date the State agency is notified or otherwise discovers the possible loss to a household.

7 C.F.R. § 278.6(e)

Penalties. FNS shall take action as follows against any firm determined to have violated the Act or regulations. The FNS regional office shall:

* * * *

(2) Disqualify the firm for one year if: (i) The evidence shows that: (A) It is the firm's policy to sell expensive or conspicuous nonfood items, cartons of cigarettes, or alcoholic beverages, in exchange for food coupons, and the firm has engaged in such practices, or (B) The firm bought coupons at discount, and (ii) The firm was warned about the possibility that violations were occurring and of the possible consequences of violating the regulations.

* * * *

FNS Instruction 744-9 III A 2 a

Types Of Ineligible Items. To help the reviewer in his/her evaluation, ineligible items are divided into three types—marginal, common grocery, and major non-grocery types. The reviewer must carefully consider the types of ineligibles sold in order to determine the seriousness of the violations.

(1) *Marginal ineligible items* are items which can easily be mistaken for ineligible items, such as canned pet food, or any orally administered patent medicine.

(2) *Common grocery-type ineligible items* are easily identifiable ineligible items of low cost such as cleaning products, paper products, and other low-cost household items.

(3) *Major non-grocery-type ineligible items* consist of the following types of items:

(a) *Alcohol*: Any quantity of "hard" liquor, four, six, or eight-packs of beer or malt liquor, or 4/5 quart of wine (or its comparable measurement in liters). Single bottles or cans of beer sold in quantities of less than four, or bottles of wine smaller than described above, are not considered major items.

(b) *Cigarettes*: A carton of cigarettes, or ten loose packages purchased at one time. Loose packages of cigarettes in quantities of less than 10 are not considered major items.

(c) *Gasoline*: Any amount of gasoline may be considered to be a sale of a major non-grocery item.

(d) *High Cost Ineligible Items*: Easily identifiable ineligible items costing in the range of $5 or more.

* * * *

FNS Instruction 744-9 III B 1

Operating Policy of the Store. As a general rule, violations shall be attributed to a disregard of program regulations, as opposed to carelessness or poor supervision, when there have been a minimum of four clearly violative sales of ineligible items, and any or all of the following persons took an active part in the violations:

a *The owner, spouse, sons, daughters, or other close relatives* of the owner who are regularly involved in the operation of the store.

b *Members of management,* including a person designated as a clerk, but who is in effect running a store in the absence of the owner for extended periods of time or on a regular basis.

c *Two or more clerks* who sell common grocery-type or major non-grocery-type ineligible items without refusal during the course of the investigation when there is a record of previous compliance action which documents that the owner or appropriate store official had been cautioned about the possibility of violations occurring in the store and the consequence of being found violating.

* * * *

FNS Instruction 744-9 III D

The Record of Previous Compliance Action. Previous compliance action is any action taken to confront the retailer with the possibility that violations are being committed in the store and cautioning him/her against further violations. Such action may be taken as a result of admitted or observed violations, rumors or complaints, unusually high or erratic redemptions, or some other cause for suspicion. Normally, the firm will have been sent a letter before an investigation is conducted for the following reasons:

1 Informing the owner or manager that there are indications that violations may be occurring, and

2 Warning them of the possible consequences of being found violating.

The compliance action should have occurred within 3 years of the date that violations were uncovered during investigation of the store. If there has been a change in management in the store since the compliance action was taken, consideration shall be given as to whether the record shows that the owner or appropriate representative of the store, such as a district manager, was made aware of the action.

* * * *